the trial president's. I would therefore set aside the order as to costs since the appeal is allowed for the purpose of a retrial as stated above.

The last point is that the order is silent as regards the sub-tenants who were not made parties to the action. In my view, the express provision of section 17(2) requires the trial president to declare in his judgment for possession against the tenant, whether it shall be enforceable against any sub-tenants or not. This was not done. On the contrary, the trial president made an order for the demolition of the building within three months which affects the sub-tenants. No such order was asked for in the statement of claim by the respondents in the first instance.

Appeal allowed for the purpose of a retrial.

Solicitors: *Karpal Singh & Co.; Lim Ewe Hock.*

FEDERAL FLOUR MILLS LTD. v. "TA TUNG" OWNERS & ORS.

[O.C.J. (Abdul Hamid J.) June 19, 1971]

[Kuala Lumpur — Civil Suit No. 1455 of 1966]

Shipping — Bill of lading — Cargo to be shipped in good order and condition — Cargo discharged by stevedores — Independent contractors — Charterparty — Breach of — "Vessel shall be suitable for grab discharge" — Cargo damaged — Duty of carrier to exercise due diligence — Seaworthiness — Hague Rules, Arts. III rr. 1 & 2, IV r. 2.

Shipping — Arrest of ship — Bona fide — Counterclaim for demurrage.

Negligence — Burden of proof — Charterparty — Cause of damage to cargo uncertain — Burden on shipowner to disclaim responsibility.

Practice and Procedure — Costs — "Bullock" or "Sanderson" Order.

The plaintiffs claimed damages against the first defendants, owners of the vessel "Ta Tung". Under a bill of lading dated October 18, 1966, wheat in bulk was shipped in good order and condition aboard the vessel "Ta Tung" for delivery at Port Swettenham. The plaintiffs were the owners or consignees of the cargo. It was expressly provided that all the terms condition clauses and exceptions of a charterparty dated August 31, 1966, shall be incorporated in the bill of lading. Clause 39 of the charterparty provided that the vessel was to be suitable for grab discharge. The second defendants, independent contractors, were engaged by the plaintiffs as stevedores to unload the wheat.

When discharge operations commenced, it was discovered that the wheat grain had been contaminated with diesel oil. The plaintiffs alleged that there was a breach of clause 39 of the charterparty as the ship "Ta Tung" was not suitable for grab discharge, and that there was a breach of Article III rules 1 and 2 in the Schedule to the Australian Sea-Carriage of Goods Act, 1924 (Hague Rules), when the shipowners failed to make the ship seaworthy.

Held: (1) there was no evidence to show that the leakage of diesel oil had resulted from the damage caused by the grab used in unloading by the second defendants and therefore the second defendants were not liable;

(2) the onus was on the shipowners to show that they had exercised due diligence to see that the ship was seaworthy. On the facts the shipowners had failed to prove that they had exercised due diligence to see that the ship was seaworthy and they were therefore liable to pay the plaintiff's claim;

(3) Where the precise cause of the damage to the goods was uncertain the burden was on the shipowner to show that the cause was not one for which he was responsible;

(4) the shipowners were not entitled to succeed in their counterclaim for demurrage as the plaintiffs acted *bona fide* when they arrested the ship.

Observations on the appropriateness of a *Bullock* order as opposed to a *Sanderson* order for costs.

Cases referred to:-

(1) *Ballantyne & Co. Pursuers* v. *Paton and Hendry* (1912) S.C. 256.

(2) *Blaikie & Ors.* v. *Stembridge* 141 E.R. 703.

(3) *Sack* v. *Ford* 143 E.R. 36.

(4) *Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.* 29 Ll. L. R. 133 at p. 136.

(5) *Albacora S.R.L.* v. *Wescott & Laurance Line Ltd.* [1966] 2 Ll. R. 58.

(6) *F. C. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.* 27 Ll. L. R. 395.

(7) *Walter Turnbull & Ors.* v. *The Owners of the Ship "Strathnaver* (1875) 1 App. Cas. 58.

(8) *Mayer* v. *Harte & Ors.* [1960] 2 All E.R. 840.

CIVIL SUIT.

K. A. O'Connor (*M. Shanker* with him) for the plaintiffs.

M. Karthigesu (*R. C. Hoffman* with him) for the first defendants.

J. J. Puthucheary (*Abdullah Yusoff* with him) for the second defendants.

Cur. Adv. Vult.

Abdul Hamid J.: This is a claim by the Federal Flour Mills Limited against the owners of the vessel "Ta Tung" of the Port of Panama for the sum of $169,291.34, interest at 6% per annum from 11th November, 1966 up to the date of realization and costs or in the alternative against the Cargo Handling Corporation or both or all of them for damage sustained by the plaintiffs by reason of the contamination of the wheat by diesel oil.

Under a bill of lading dated 18th October, 1966, 7,773 tons 8 cwts. and 2 qrs. of wheat in bulk were shipped in good order and condition aboard the vessel "Ta Tung" for delivery at Port Swettenham. The plaintiffs were the owners or consignees of the cargo. It was the duty of the first defendants to deliver by the said bill of lading wheat in the same good order and condition as that in which it was shipped. It was expressly provided that all the terms, condition clauses and exceptions of a charterparty dated 31st August, 1966 (made between the first defendants as owners and William Charlick Limited as charterers) shall be incorporated in the bill of lading. Clause 39 of the charterparty provided that the vessel shall be suitable for grab discharge.

The ship sailed on 19th October, 1966 and arrived at Port Swettenham on 2nd November, 1966. Notice of readiness (AB1 p. 14) was tendered to Mr. Sansom (PW 1) the manager of Federal Flour Mills Limited on 3rd November, 1966 and was ready to commence discharging cargo in accordance with the terms and conditions of the charterparty.

Discharge commenced on 3rd November, 1966. On 13th November PW 1 was advised of the damage to the wheat on board the vessel. Dark discoloured grains were found at the back of the after end of the No. 4 Hold (Portside). There was also an oily smell. Discoloured grains were also found in the hopper, on the conveyor belt and in the godown at the place where the wheat was being discharged. Apparently diesel oil had contaminated the grains.

Discharge operations were carried out by means of grab attached to the derrick. The Cargo Handling Corporation (second defendants) were the stevedores who operated the discharge. The grab would release the wheat taken from the ship into a hopper on the wharf. From there the wheat was taken by the elevator to a series of conveyor belts to the storage area.

The second defendants were engaged by the plaintiffs to unload the wheat at the rate of $1 per ton. The second defendants themselves selected the mandors, winchmen and labourers and had direct control over these men.

On the evidence before me, it would appear that the second defendants were independent contractors although the grab and other equipment used for unloading were supplied by the plaintiffs.

The plaintiffs are alleging that there was a breach of clause 39 of the charterparty as the ship "Ta Tung" was not suitable for grab discharge and that there was a breach of article III rules 1 and 2 in the Schedule to the Australian Sea-Carriage of Goods Act 1924, when the shipowners failed to make the ship seaworthy.

Notice of readiness was tendered on 3rd November, 1966 but Mr. Sansom (PW 1) said that he did not accept it in its original form. He accepted it in the form shown on page 14, *i.e.*, "except in respect of clause 39". It is the plaintiffs' case that the ship was partly unsuitable for grab discharge. The circumstances that led PW 1 to accept the notice in that form may be found from the cable sent to and the reply from the charterers (page 15 and page 16 AB 1), also from the contents of the letter from the charterers (at page 17 AB 1).

Before I proceed to consider the plaintiffs' case against the shipowners, I should like to deal with the plaintiffs' claim against the second defendants. The allegations are twofold —

"(a) The mechanical grab fouled and damaged the steel protection box by the injudicious and negligent use of the mechanical grab by the stevedores during the discharging of the said cargo of wheat on or about the 7th November, 1966. (Page 10 of pleadings).

(b) Further when the said grab fouled the said steel protection box as aforesaid the stevedores wrenched it away by taking hold of it with the said grab thus damaging and distorting the bolts holding down the inspection hatch cover. The inspection hatch cover became loosened thereby and caused the ballast from the No. 3 deep tank to leak." (Page 11 of pleadings)."

Mr. Puthucheary submitted that there was no evidence whatever to show that the second defendants fouled the protection box or in any way operated the grab injudiciously or negligently. The wheat was at least three or four feet high when the discoloured grain was first sighted and the protection box over the inspection hatch could not then be seen and there was no evidence as to the source of the oil.

He further submitted that there was no evidence to show that the grab had at any time come into contact with and/or damaged the bolts of the inspection hatch in the No. 4 hold (Portside). In this regard, one of the questions which the court has to consider is whether the swinging of the grab into the wings was an injudicious or negligent act.

Mr. Puthucheary drew my attention to the evidence given by various witnesses to show that it was customary to take the grab into the wings. No complaint, he said, was raised by any of the ship's officers. PW 1 himself conceded that it was expected that the Cargo Handling Corporation's men would push or pull the grab into the wings.

Captain Bulbrook (PW 5), one of the experts called by the plaintiffs, described how the wire had to be pulled to get the grab into the wings. He expressed the view that it was a usual practice in his time, and to his knowledge, the use of the grab by this method had not changed. He was further of the view that it was not an injudicious practice.

Captain Rivers, a surveyor engaged by the plaintiffs, also expressed the view that, in order to discharge cargo from the wings, it was customary to swing the grab into the wings.

Mr. David Robertson Moody (DW 1) the shipowners' surveyor, agreed that the grab could be used in the wings but in his opinion, it would be more trouble than it is worth with regard to expedition of discharge. The proper use of the grab, according to him, is to plumb it in the square of the hatch. Nevertheless, he conceded that it could properly be used if it has a natural swing assisted by manual means. Calculated at an angle of 130°, the natural swing in the No. 4 hold of the "Ta Tung" (height of 14 feet 6 inches) is about 3 feet 2 inches. In his view, it was not dangerous to swing 3 feet 2 inches. He also agreed that it would not be improper to swing 4 feet 2 inches, that is, one foot beyond the natural swing into the wings. The inspection hatch is situated four feet from the plumb line taken from the upper 'tween deck coaming and this, I think, is well within the path of the natural swing of the grab. Furthermore, it is clear that the stevedores had no knowledge of any projection which may have got in the way of the grab by its natural swing. When the damage was sighted in the No. 4 Hold, the inspection hatch was still not visible. For these reasons, I am unable to conclude that the stevedores' operation of the grab was injudicious or negligent.

It may be argued that the stevedores were obliged to inquire whether there was any obstruction which would render the hold unfit for grab discharge. To my mind, they were not obliged to do so. The shipowners were fully aware that the discharge was to be made by grab and apparently it was the practice that the ship's officers would generally supervise the discharge operation. These officers have special knowledge of the structure of the ship, particularly the existence of any

projection on the floor of the hold which might become damaged by the grab and affect the safety of the ship.

It has been pointed out that one of the questions which the court has to consider is whether the grab nevertheless caused the damage to the inspection hatch. One of the tests that was carried out by the surveyors was to lift the box with the grab. The purpose of this test was to determine whether the grab could cause the damage to the box, the lid and the securing bolts of the inspection hatch. In their reports, Captain Tunbridge and Captain Rivers expressed the view that there was a possibility of the inspection hatch being damaged if the box had in fact been removed by the grab. Clearly, there is no evidence of any kind to show that the box had at any time been so removed and furthermore, there is nothing to show that the protection box to this inspection hatch was in fact damaged.

That brings me to the suggestion made by the plaintiffs that the box was never fitted to this inspection hatch. Evidence was adduced concerning the discovery of a protection box in the wheat a few days before the 13th at which time the wheat in the No. 4 hold was almost full. With the assistance of the bosun, the box was lifted and placed on the deck. According to PW 6, this box was the same one that he saw near the inspection hatch in question. If it was, then it could only mean that in all probability, the box might not have been fitted to the inspection hatch. The evidence on this point is insufficient for the court to reach a definite conclusion. Nevertheless, in view of the fact that a protection box was found amongst the wheat, I am inclined to think that this inspection hatch was probably not protected during the discharge operation. Without such protection, the No. 4 hold would, I think, be unfit for grab discharge. Obviously the bolts could easily be damaged by the grab. However, whether the grab did cause the damage to the bolts is clearly a question of fact for the court to decide. According to Jagir Singh (PW 6), the bolts were not damaged when he saw them. After the discovery of the contaminated wheat, bagging was done and in the evening of the 15th, the level of the wheat in the No. 4 hold went down to the level where he could easily see all the places including the inspection hatch. PW 6 did not see any protection box over the inspection hatch. He tested the bolts and found them very tight, and he did not notice any sign of damage to the bolts. Besides PW 6, there was no other witness who could testify as to the condition of the bolts on the evening of the 15th. The vessel apparently left for deepwater point some time after midnight. PW 1 did say that he saw the bolts and they were damaged. However, that was on the 16th. Tan Teik Chin (PW 3) on the other hand, said that he noticed the hatch only on the 18th and on previous visits that area was covered with wheat. Mr. Tan, however, did not go on board the vessel on the evening of the 15th, that is, the same evening when PW 6 first noticed the hatch. There were of course certain discrepancies in the evidence of PW 6. At first he seemed to think that he saw the hatch in the afternoon but subsequently he corrected himself by saying that he saw it around 10.00 or 11.00 p.m. that evening when he visited the hold with Mr. Mantle. After considering the evidence of PW 6 as a whole, and bearing in mind the lapse of time since this incident occurred, I have no reason to doubt that he was telling the truth. Although he was subjected to lengthy cross-examination, he did not appear to have contradicted himself in any material particular.

Captain Tunbridge himself did not make any mention in his report concerning the condition of the inspection hatch. This probably is due to the fact that the only occasion he boarded the vessel was some time in the morning of the 13th. On the evidence before me, I am satisfied that PW 6 did in fact see the inspection hatch on the evening of the 15th and that the bolts to this hatch were not damaged then.

Certain findings were made by the ship's surveyors concerning the damaged bolts. The relevant portion of the findings is as follows —

> ".... It was noted that the port inspection hatch lid was loose and the swivel 15/16th" threaded steel bolts were lying horizontally on the 'Tween Deck level. It was seen that in the case of all bolts, the threads had been damaged and the bolts themselves distorted to varying degrees. The two forward bolts were badly distorted and mis-shapen, and signs of scoring, as if by a heavy object were apparent on these bolts."
>
> ".... In view of the fact that grabs were being used for discharge and noting other damage in the compartment, we are of the opinion that the protection cover was lifted by the grab and the holding-down bolts of the inspection hatch were damaged by the grab during discharge. As a result of this, it would appear that at least two of the four bolts were knocked out of position and thus the oil/water tight seal between the inspection hatch cover and the hatch coaming top was broken."

This finding was obviously based on the condition of the bolts as they found them on the 18th. If, as PW 6 had stated, the bolts were intact and he did not see any recent damage, then in that event, I do not see how this court can rely on such finding. Similarly, I am also unable to accept the further assumption by the surveyors who said —

> "From the above we are of the opinion that the leakage of oil and/or ballast into the No. 4 lower 'tween deck compartment could reasonably be considered to have occurred as a result of stevedores' damage to the structure of the vessel." (Page 7 AB2).

Besides, there is also the evidence of PW 6 that on the night of the 15th, at the No. 4 hold, Mr. Mantle did make some inquiries as to the source of the leak. Mr. Mantle apparently told PW 6 that he did not think the oil came from the inspection hatch. Presumably he reached this conclusion after satisfying himself that there was no sign of damage to the bolts. The report of the ship's surveyors also did not contain any reference as to the condition of the bolts prior to the 18th. PW 6 also testified that on the 18th, these bolts and nuts were bent. They were quite different from those he saw on the 15th.

While on this subject, I should bear in mind that according to Captain Rivers, he was told these bolts were used during the voyage but when an attempt was made to fit these bolts to the No. 3 inspection hatch, only three of them could be fitted. The fourth one was of a wrong size and it would not fit into the jaw of the rig on the deck.

Referring to the grab test, Captain Rivers further stated that the bolts were then not in position under

the protection box. He expressed the view that if the bolts were damaged by the grab, there should be some signs of damage to the top or sides of the inspection hatch.

In these circumstances, I am inclined to think that these bolts might not have been the ones that were used during the voyage. In the absence of any evidence that the bolts were damaged by the grab, I cannot conclude as a fact that the leakage had resulted from the damage caused by the grab. If the leakage had not resulted from such damage, then it is necessary to determine the source of the leak.

First, I ought to say this. I am satisfied that on October 19th, a day before the No. 3 (portside) deep tank was ballasted, there was some oil left in the tank and it surfaced after the ballast. When the survey was carried out, the ship's surveyors evidently found that the level of the water ballast in the No. 3 port deep tank was about 5" below the crown and they saw signs of what appeared to be diesel fuel oil on the surface of the ballast water. The plaintiffs' surveyors confirmed this fact when they said —

".... On lifting the manhole lids we noted that No. 3 deep Tank each side was nearly full and contained ballast water with a heavy layer of oil." (Page 15 AB2).

Now, in considering the source of the leakage, I shall in particular consider the evidence of PW 6. Before I do so, I must first of all refer to that portion of the plaintiffs' surveyors' report which says —

"... No leaks in the tank top or inspection manhole were detected during this test." (Page 16 AB2).

I do not think it can be disputed that no leak was detected during the test and the tank was sound and tight [page 9 AB2 under the heading 'No. 3 (port) deep tank']. Nonetheless, this does not provide proof that the oil had not leaked through this inspection hatch. As the surveyors observed —

"The coamings of the manhole covers — about 3½" in height — had been cleaned and it was impossible to ascertain from our visual inspection whether or not oily water had leaked from the lids." (Page 16 AB2).

Now, according to PW 1, he saw the discoloured grain somewhere at the back after end of the No. 4 hold (portside). Obviously he could not say where the oil came from. Nevertheless, he marked on the plan (page 11 AB2) by circling in blue the approximate area where he saw the discoloured grain. This area was apparently adjacent to the No. 3 (port) inspection hatch. Mr. Tan who accompanied PW 1 asked the first officer whether there was a tank below the wheat. The officer said that there was but it was empty. Under cross-examination, Mr. Tan repeated his earlier statement. In his view, the chief officer knew very well what was inside the tank.

Mr. Tan also said that Captain Tunbridge himself asked the chief officer whether there was any deep tank below the wheat and the officer told Captain Tunbridge that there was the No. 3 deep tank (portside) and it was empty. This is confirmed by the plaintiffs' surveyors' report (at page 24 AB2) where it is stated that —

".... The chief officer on being questioned advised us that No. 3 deep tank was empty. The Master evaded answering our questions."

Now, according to PW 6, he went to the No. 4 hold (portside) with Mr. Watts and apart from the smell of oil, he found, after taking one scoop with the grab, dark oily wheat. PW 6 further said that when he saw the inspection hatch on the evening of the 15th, he could see plenty of oil around the inspection hatch. He himself wanted to know where the oil was coming from and it was then that he tested the bolts with his hands and found them very tight.

In answer to cross-examination by Mr. Karthigesu, PW 6 repeated that he found plenty of oil around this inspection hatch. He even gave a description of the area covered by the oil. According to him, the oil stretched around the manhole and after part up to the No. 2 deep tank right up to the bulkhead. He also marked a rectangular-shaped area (red) on the plan (page 11 AB2) to show the area covered by the oil. The No. 3 deep tank (portside) inspection hatch is shown to be within this area. PW 6 further stated that when he said 'plenty of oil' he meant 'oil in liquid form that when one walks over with shoes on, the shoes can get wet'. He believed the oil to be diesel oil.

PW 6's evidence is, I think, substantiated by the ship's surveyors' findings of the oil-tide marks in the No. 4 hold as shown (on pages 55, 57 and 59 AB2). In this regard, the plaintiffs' surveyors' report states —

"... It was significant that this side of the hold had been swept clean and apparently attempts had been made to remove as much trace of oil as possible. However we noted that large patches of the deck, particularly at the after end, were oil stained. Further there were quantities of oil coverd grain at the landings of the deck and ship's side and after bulkheads." (Page 15 AB2).

"Various areas were marked out by chalk and photographed in an endeavour to clarify the general condition of the hold." (Page 15 AB2).

In dealing with this question, perhaps I must say this. Captain Rivers did say under cross-examination that no conclusion could be reached that oil had flowed from this inspection hatch. But it must be remembered that when the plaintiffs' surveyors carried out the inspection, the oil was no longer found on the deck of the No. 4 hold. The deck had been cleaned. The only traces of oil were the oil-tide marks. In any event, it is clear from the evidence of Captain Rivers that the oil-tide marks were found within the close proximity of this inspection hatch, when he said —

".... The square chalk line on page 57 AB2 is approximately level or slightly behind the No. 3 deep Tank Inspection Hatch (Portside). There were oil marks along the line of the wall extending right back to the after bulkhead. It extended along the line of the bulkhead across to the Starboardside — less on Starboardside. Along the portside wall, there were heavy traces of oil. There were signs of cleaning up above the No. 3 deep tank." (Page 112 notes of evidence).

Some suggestions were made to the effect that the contamination may possibly have resulted from the leakage in some of the oil pipes. To my mind, there is not a scrap of evidence to show that the oil found could in all probability have come from any of the oil pipes. After considering the evidence carefully, it is my conclusion that, on the balance of probabilities, the leakage had come from the No. 3 deep tank (portside) inspection hatch although the inspection hatch itself had not in fact been damaged by the grab.

The necessary question that arises is how therefore could there be such a leakage? The only inference that may be drawn is that, in all probability, the lid to the inspection hatch had not been properly secured to make it leakproof.

It is true that the Marine Underwriters' Association of South Australia, Adelaide, gave a certificate of approval to load grain (AB1 page 6) certifying that the vessel "Ta Tung" was examined by a surveyor and passed as complying with the applicable regulation of the Association of Stowage and Dunnage Regulations and approved to load cargo but it is stated quite clearly in the certificate that, that was not a certificate of seaworthiness.

I now turn to the plaintiffs' allegation that the bill of lading was expressly made subject to the rules contained in the Schedule to the Australian Sea-Carriage of Goods Act, 1924 and that they are entitled to the privileges, rights and immunities conferred therein. The plaintiffs, in particular, are relying on article III rule 1 and article III rule 2 which are as follows —

"Article III Rule 1

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds and all other parts of the ship in which goods are carried, fit and safe for their reception carriage and preservation.

Article III Rule 2

Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." (Page 6 Pleadings).

First, it is alleged that in breach of their duty, the first defendants failed to make the ship seaworthy. The particulars set out in the pleadings refer to the projection of the inspection hatch in the No. 4 hold and the existence of the No. 3 deep tank underneath which contained oil. It is alleged that the said inspection hatch was not oil-tight with the result that fuel oil leaked and contaminated the wheat.

It is established that there was the No. 3 deep tank below the inspection hatch and some diesel oil was left therein. Apparently it surfaced after the tank was ballasted on 20th October and had probably seeped through the inspection hatch if it had not been properly secured. Whether the inspection hatch had or had not been properly secured was within the special knowledge of the shipowners and the cargo owners could not be reasonably expected to know.

To be more specific, may I say this. The shipowners knew that they had to carry bulk cargo and that the cargo could be damaged if there was a leakage. It is therefore reasonable to expect the shipowners to exercise due diligence to see that the inspection hatch was properly secured and leakproof before loading. On the evidence before me, it is clear that the inspection hatch is projected above the deck level. Captain Bulbrook stated that the inspection hatch projects about four inches above the deck and from the deck level to the top of the bolts, the height is approximately eight or nine inches. The lid of the hatch is secured by means of four bolts. The bolts were fixed in the way shown in the photograph (page 55 AB2). According to Captain Bulbrook, they may slide off and loosen the lid and may cause leakage. He expressed the view that it is most unsatisfactory that they should be left in that manner. These projections could get damaged while working the cargo and there would be a leak if the lid came up or got bent. Captain Bulbrook further observed that if the protection box is placed over the inspection hatch without being properly secured, it is still an unsatisfactory protection. In his opinion, if grab is used for discharging, it may damage the box, and, depending on the force and strength of the box, it could fracture the inspection hatch. He went on to say that if he were the master of a ship carrying grain, he would conduct an inspection of the hold before loading, to see that the bilges and limbers are clear so that the liquid could run away if necessary. As regards an inspection hatch of this type, he expressed the view that he would inspect it thoroughly to see that there is no leakage. In his opinion, there is an additional way of securing the inspection hatch to ensure that there is no leakage. A rubber washer underneath the lid should be fixed to make it liquid-tight. He went on to say that he would test the tank for liquid-tightness before loading, in particular, he would pressure-test.

Captain Rivers, in his evidence, expressed the same view regarding the protection box. In his opinion, it could be swept away in the process of loading grain powered in through a hose pipe. Speaking about the inspection hatch, Captain Rivers stated that it is an effective method of keeping the liquid that might be in the tank underneath the hold from getting into the hold if it is properly secured, that is, if the joint between the lid and the wall around the manhole cover is soundly packed. An opening for inspection of liquid cargo such as the one under consideration, should be one which could be properly secured, but he is of the view that it should also be properly protected and to place a protection box over it is not an adequate protection. He is also of the view that the presence of such an inspection hatch would render it unsuitable for grab discharge. Referring to the presence of the deep tank below the lid, he felt that it should be pressure-tested before loading to see if there was any leak.

In the light of the evidence which has been adduced by the plaintiffs, I am firmly of the opinion that, in view of the nature of the inspection hatch, its situation in relation to the path of the grab and the presence of a deep tank which would carry liquid, this part of the ship, namely, the No. 4 Hold, is unsuitable for carriage of bulk cargo, particularly if the cargo is to be discharged by grab.

Mr. Karthigesu quite rightly pointed out that in order to determine whether or not the vessel was seaworthy, it all boils down to one thing, that is, the inspection hatch in question — its position, projection and protection. To my mind, the nature of the inspection hatch is clearly such that not only there could be a leakage resulting from the damage caused

by the grab, but there could also be a leakage if the bolts were not properly secured and the lid not properly packed. It seems clear that in the event of a leakage, the wheat would be contaminated. Once it is established that the leakage had in all probability come from this inspection hatch, then, in view of the nature of the cargo that the vessel was carrying and knowing that the oil remaining in the hatch would surface once the tank is ballasted, I should think it is for the shipowners, being a matter within their special knowledge, to show that not only the inspection hatch was properly secured with good bolts but it was also leakproof before loading. I need scarcely add that there is that duty placed upon the Master of a ship to exercise due diligence to see that the ship is seaworthy.

In the present case, no ceiling was fitted to the floor of the hold. By itself it does not render the ship unseaworthy but it cannot, I think, be denied that in view of the nature of the cargo to be carried, such a ceiling if fitted, might have saved the cargo from contamination. The plaintiffs have adduced evidence to show the necessity of having ceilings fitted to the deck of the No. 4 Hold, particularly in view of the inspection hatch projecting above the deck level. It is the plaintiffs' case that if ceilings were fitted, this would afford protection against damage to the inspection hatch. The shipowners contended that the inspection hatch was duly protected by a protection box. The plaintiffs have endeavoured to show, and I think they succeeded in establishing to my satisfaction, that the protection box was merely placed over the inspection hatch and it was not at all properly secured. In this regard, it is, I think, important to consider the usefulness of a ceiling if fitted. Assuming that the oil had seeped through to the deck of the No. 4 Hold, a ceiling if fitted might, in all probability, have saved the bulk cargo from being contaminated.

The shipowners argued that good reasons were given by Mr. Moody, the ship's surveyor (DW 1), for not fitting the ceiling. Mr. Moody disputed the correctness of the contention that ceilings are always fitted to grain-carrying vessels. He emphasized that bulk-carrying ships did not have ceilings. In his opinion, it is undesirable to have ceilings in a vessel carrying grain as they are liable to damage themselves and foreign articles may get underneath the timber such as previous cargo, in particular, ants, cockcroaches and other insects. In cross-examination, DW1 stated that it is not advisable to fit ceilings to ships carrying cargo which is to be discharged by grab. But subsequently he modified his earlier statement by saying that for ships to be continually used for carrying cargo to be discharged by grab, he agreed that ceilings should be fitted.

Captain Rivers, on the other hand, stated that the type of inspection hatch shown (on page 58 AB2) should be placed in the recess in the wooden ceiling extending over the whole of the hold floor. At the inspection hatch itself, it should be covered with wooden cover so that there is a flush surface. The purpose of that ceiling, he said, is to protect the cargo if there is any leakage since there is a space left under the ceiling to allow flow into the bilges.

To my mind, having regard to the type of inspection hatch, the position that the hatch is situated, the existence of bolts projecting above the deck level and the fact that it is covered only with a protection box which may be easily dislodged or displaced, the shipowners ought to have fitted the deck with ceilings.

At this juncture, I pause to consider the evidence of Mr. Moody, the ship's surveyor (DW1). Referring to the oil-tide marks, he expressed the view that this could have been caused by oil in the No. 3 deep tank which leaked through the inspection hatch damaged during discharge. He also attributed the leakage to the listing of the ship due to uneven discharge. This apparently was the conclusion that he arrived at and also what he gathered from the Master of the ship. Mr. Moody's conclusion, I think, confirms my finding of fact that the leakage did come from this inspection hatch but as I said earlier, there is no evidence whatever to show that this leakage was as a result of the damage done to the hatch during discharge.

As regards the certificate of approval issued by the marine underwriters to the effect that the ship is ready in all respects to load grain, Mr. Moody expressed the opinion that the implication is that the ship is fit to load grain. I only wish to emphasize that whilst the ship may be considered to be fit for loading, there is no doubt whatever that there was no guarantee by the underwriters that the ship was seaworthy.

Mr. Moody confirmed that the record of soundings indicates that there was three inches of liquid in the deep tank on the 19th. That being the case, the master of the ship must, I think, be assumed to know of this fact. It must also be assumed that he knew the deep tank was to be ballasted and in which event ought to have pressure-tested the inspection hatch to ensure that there was no leakage.

Mr. Moody did concede that the inspection hatch in question is of an unusual type and he agreed that it would be better to have some sort of permanent protection. He also conceded that he did not know whether this hatch was oil or water-tight before the vessel was loaded and he only assumed in his report that the inspection hatch was oil or water-tight. He did not dispute that the oil leak could have occurred during the voyage.

Speaking about the bolts of the inspection hatch, he agreed that if they were damaged before the voyage commenced, this hatch would not be water-tight.

When he was asked by Mr. O'Connor about the inspection before loading (Handy Book page 204), he expressed the view that it is not mandatory that this should be done every time the ship is loaded. In his opinon, it is only a guide. Referring particularly to paragraph 7 which recommends an inspection of hatch coamings, he also expressed the view that this is only of an advisory nature and whether or not the tank should be pressured-up would depend on when it was last pressured-up. If it was only recently done, then it would be unnecessary to do it before loading and in such a case, visual inspection should be sufficient. In the present case however, there is no

evidence whatever to show that any pressure-up at all was done. In effect there was no evidence whatever to show that this inspection hatch was leakproof before loading.

In the circumstances of this particular case, I am not satisfied that the shipowners have shown to my satisfaction, that they exercised due diligence to see that the ship was seaworthy.

I will now turn to the question of burden of proof. Mr. O'Connor drew the court's attention that paragraphs 1 to 4 of the statement of claim have been admitted by the shipowners. It is contended that what the plaintiffs have to do is to establish a *prima facie* proof that damage has taken place while under the charge of the shipowners. The learned counsel also drew my attention to the various terms of the charterparty, in particular, clauses 12, 19, 38 and 39. It is submitted that there is nothing in the charterparty to alter the common law position and as such, it is the duty of the shipowner to see that the cargo is safely discharged. He cited *Ballantyne & Co. Pursuers* v. *Paton and Hendry.*[1] In that case, an action brought by the owners against the charterers of a ship for damages in respect of damage received by the ship during the discharge of the cargo, the pursuers averred that the defenders were liable, because they had employed and paid the stevedores and the owners of a crane engaged in the discharge, by whose negligence the damage was caused.

It was held —

"that, as it was not averred that the defenders had undertaken the control of the discharge of the cargo, the pursuers had failed to set forth a relevant case; and action dismissed."

Mr. Karthigesu submitted that *Ballantyne's* case, *supra,* is not a good authority as there is a whole series of English cases all on one side of the line and this solitary case is on the other side of the line. He further submitted that *Ballantyne's* case was decided on the state of the pleadings and on the evidence given. I do not think that it is for me to say whether *Ballantyne's* case is good or bad authority. However, it would seem to me that this case was indeed decided on the state of the pleadings inasmuch as I shall have to decide the present case on the state of the pleadings and the facts adduced.

Mr. Karthigesu also argued that clause 19 and clause 20 should be read together and the effect of these two clauses read together is to make the plaintiffs responsible for the discharge He further argued that on the evidence of PW1, it is established that the plaintiffs have taken upon themselves the responsibility of discharging the cargo and had full control of the discharge. He cited the case of *Blaikie* v. *Stembridge*[2]; *Sack* v. *Ford*[3] (Erle C.J.'s judgment at page 40 where construction was placed upon the wordings of the particular charterparty). Mr. Karthigesu submitted that the responsibility for discharge under clause 38 is on the charterers.

Having regard to the relevant clauses, in particular, clauses 19, 20 and 38, I am of the opinion that they should be read subject to clause 24 which reads —

'The provisions of section 5 and 8 of the Australian Sea-Carriage of Goods Act, 1924, and of articles III (except clause 8 thereof), IV, VIII, and IX of the Schedule thereto shall apply to this charter-party and shall be deemed to be inserted in extenso herein. This charter-party shall be deemed to be a contract for the carriage of goods by sea to which the said sections and the said articles apply, and no regard shall be had to article I of the said Schedule . . . ."

To my mind, it cannot be reasonably construed that the shipowners are relieved by the terms of the charterparty of their obligation to safely discharge the cargo. For the purposes of the present case, however, it is hardly necessary for me to deal with this point at length since I have arrived at the conclusion that the leakage that resulted in the damage had probably taken place some time after the No. 3 deep tank was ballasted. Furthermore, there is no evidence to show that the leak was caused by the damage to the inspection hatch during the discharge.

I shall now examine some of the other cases which have been cited before me on this question of burden of proof. The learned counsel for the plaintiffs has submitted that there is a breach of article III rule 1 for failure to exercise due diligence. Mr. O'Conner drew my attention to the sentence appearing on page 425 of *Scrutton* on Charterparties and Bills of Lading which says that —

". . . . it is not enough that the loss is unexplained, because the onus is on the carrier to show absence of fault or negligence."

It is contended that in the present case, there is no question of any exception applying to the shipowners and there is no proof by the shipowners that they are within an exception. I will now refer to certain passages regarding the burden of proof (at page 93) of *Tetley* on Marine Cargo Claims —

"*First,* it should be noted that due diligence must be proven by the carrier before he may exculpate himself under art. 4(2) of the Hague Rules. This was clearly pointed out by the Privy Council, in *Maxine Footwear* v. *Can. Government Merchant Marine,* where Lord Somervell said: 'Article III, rule I, as an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.'

In *Toronto Elevators Ltd.* v. *Colonial SS. Ltd.,* Angers J. Said: 'The primary obligation placed upon the carrier before he can take advantage of one of the exceptions provided by article IV, rule 2, is the exercise of due diligence.'

American jurisprudence on the point seems confused, perhaps because of a difference betwen the Harter Act and Cogsa. Under the Harter Act due diligence to make the vessel seaworthy had to be proven in every respect, while under the Rules (and Cogsa, which is the American version of the Rules) due diligence has to be proven only in respect of the loss claimed. Thus, the U.S. Court of Appeals, in *Firestone Syn. Fibers Co.* v. *Black Heron,* held that 'error in the management of the ship is not conditioned as it is under the Harter Act, on a showing of seaworthiness or due diligence to make the vessel seaworthy'. The court relied on Clancy D.J., in *Isbrandtsen Co.* v. *Federal Ins. Co.,* but a study of this latter judgment indicates that Clancy D.J. really meant that due diligence need not be proven in every respect, but only in respect of the loss. This is, in fact, the English and Canadian position. It is submitted that the English and Canadian jurisprudence should be followed as being clearer.

Secondly, it should be noted that the burden of proving due diligence is on the carrier. This is clear from the jurisprudence and from reading art. 4 (1): 'Neither the

carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article'.

Thirdly, the carrier is not obliged to prove that the vessel was seaworthy in any respect unconnected with the loss. Only if some particular unseaworthiness contributed to a loss, then it is in respect of this unseaworthiness that the carrier must make his proof of the due diligence."

And at page 59, the learned author in dealing with loss while in the charge of the carrier says —

"The cargo claimant must make *prima facie* proof that the loss or damage took place while the goods were in the charge of the carrier. To do this, the claimant usually proves that clean bills of lading were issued, and that bad order receipts were granted at discharge. The claimant may prove alternatively that, despite the statements on the bills of lading and on the receipts, the damage was done while in the hands of the carrier. Once this proof has been made, the onus is on the carrier to contradict the bills of lading, or the receipts, or the proof of the claimant."

Mr. O'Connor also referred to the passages from pages 89 and 90. For ease of reference, I quote in full the first paragraph on page 89 and the first three paragraphs under the sub-heading 'Degree of Certainty of Cause' on pages 90 and 91 as follows —

"Before proving due diligence to make the vessel seaworthy, the carrier must prove the cause of the loss or damage. Once the cause has been proven, then the carrier may prove due diligence in respect of the loss, and then that the cause falls within one of the exculpatory exceptions. If the cause is a mystery, then it is impossible for the carrier to go on to prove the exception."

"To what degree of certainty must the cause of the loss be proven? This is a question of fact, and it would appear that an absolute degree of certainty is not required. The following cases exemplify what the courts have ruled:

Fogundes Sucena v. *Miss. Shipping Co.*: flour was damaged by salt water and it was held that there was no satisfactory proof as to the cause of the damage. The burden being on the carrier to prove that the damage was one for which it had no responsibility under its bill of lading or the Carriage of Goods by Sea Act, the carrier was liable.

Ralston Purina Co. v. *U.S.A.*: 'When the cause of damage by seawater to an ocean shipment (sacks of feed) is unexplained, the rule has always been that the damage must be presumed to have been caused by unseaworthiness of the vessel on account of failure of the carrier to exercise due diligence to make the vessel seaworthy."

In particular, I have also considered footnote (1) at page 89 of *Tetley* relating to the law set out in *Pendle & Rivet Ltd.* v. *Ellerman Lines Ltd.*[4] which reads as follows: —

"*Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.* at p. 136: cargo disappeared inexplicably. 'That being so, under article VI, rule 2 (q), the burden is on the defendants to show that these goods were lost and taken out of the case without any fault or privity on the part of the carrier or neglect by his servants or agents. Have they discharged that burden? If I accept all their evidence, in a sense they have. But in another sense they have not, because that which they seek to prove is wholly irreconcilable with the evidence for the plaintiff. There is in truth a mystery about the loss. If I accept the evidence given for the defendants the loss of the goods is quite inexplicable. In those circumstances, one side or the other must win. I cannot give victory to both. I think the only logical result is that defeat must be on the side on which rests by this statute the burden of explaining that which would be otherwise inexplicable; having regard to the wholly inexplicable conflict of evidence on both sides, I think I must hold that the defendants have not discharged the burden which is put upon them by art. IV, rule 2 (q) of the Act'."

Mr. Karthigesu cited to me a number of cases as regards the burden of proof and in particular, I refer to *Albacora S.R.L.* v. *Wescott & Laurance Line, Ltd.*[5] In this case —

"Cargo of 1,200 cases of wet salted fish was shipped, under clean bills of lading incorporating provisions of Carriage of Goods by Sea Act, 1924, in defender's steamship *Maltasian* for carriage from Glasgow to Genoa. Fish arrived at Genoa in damaged condition due to 'reddening'. Pursuers, indorsees of bills of lading, claimed alleging that defenders were in breach of contract and/or negligent. Pursuers alleged that defenders were in breach of art. III, r.2, which provided that carrier... shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Pursuers alleged that defenders were negligent in stowage and ventilation of cargo. Shipowners contended that they were exempt from liability under contract of carriage in that damage was due to inherent vice or latent defect in fish within art. IV, r. 2 (m), (p). Shipowners alleged that salt solution was insufficient in quality and quantity to prevent development of bacterial action causing 'reddening'; and that action of bacteria was not associated with conditions in hold."

It is clear that this is a case of inherent vice and it is also clear that in the circumstances of that case, the shipowners had no reason to know or suspect the risks attending the carriage of fish in warm weather and were entitled to carry it in the ordinary way.

In any event, it is, I think, important to consider the judgment of Lord Pearson at page 63 when he dealt with the obligations arising under article III, r.2 —

"Art. III, r. 2, is expressly made subject to the provisions of art. IV. The scheme is, therefore, that there is a *prima facie* obligation under art. III, r. 2, which may be displaced or modified by some provision of art. IV. Art. IV contains many and various provisions, which may have different effects on the *prima facie* obligation arising under art. III, r. 2. The convenient first step is to ascertain what is the *prima facie* obligation under art. III, r. 2.

It is not an obligation to achieve the desired result, *i.e.* the arrival of the goods in an undamaged condition at their destination. It is an obligation to carry out certain operations properly and carefully. The fact that goods, acknowledged in the bill of lading to have been received on board in apparent good order and condition, arrived at the destination in a damaged condition does not in itself constitute a breach of the obligation, though it may well be in many cases sufficient to raise an inference of a breach of the obligation. The cargo owner is not expected to know what happened on the voyage, and, if he shows that the goods arrived in a damaged condition and there is no evidence from the shipowner showing that the goods were duly cared for on the voyage, the court may well infer that the goods were not properly cared for on the voyage."

In the present case, I did say earlier on that clauses 19, 20 and 38 of the charterparty should be read subject to clause 24 which imports into the charterparty the application of article III (except clause 8 thereof) and article IV of the Schedule to the Australian Sea-Carriage of Goods Act, 1924.

As Lord Pearson very clearly explained, the obligation under article III is to carry out certain operations properly and carefully. It is true that the

mere arrival of cargo in damaged condition does not constitute a breach of the obligation. Nonetheless, much depends on the facts of each particular case. In the present case, there is an abundance of evidence from which the court may infer a breach of the obligation on the part of the shipowners. It is mainfest that they had failed to exercise due care to ascertain whether the inspection hatch in question was sufficiently secured to avoid leakage before loading. Evidently they had full opportunity of making the ship seaworthy.

In this connection, may I respectfully refer to the judgment of Lord Pearce at page 62 quoting what Viscount Sumner said in *F. C. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Company, Ltd.*[6] at page 399 —

"... When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies and inherent vice, the scheme is evident. Neither party can wholly guard against the act of God and the King's enemies, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo-owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the shipper has the advantage over him in this respect, he must bear the risks belonging to the cargo."

In the circumstances of this particular case, I am of the opinion that in the light of my finding, the onus is on the shipowners to show that they had exercised due diligence. On the facts before me, I am not satisfied that they have adduced satisfactory proof to discharge that burden.

It is therefore my judgment that the shipowners are liable to pay the plaintiffs' claim, costs and interest. As for the quantum, it is ordered that this be assessed before the registrar.

As regards the counterclaim, I have considered the submissions made by the learned counsel. Mr. Karthigesu submitted that as far as demurrage is concerned, this should be allowed whether or not the plaintiffs succeed in their claim. Mr. O'Connor, on the other hand, submitted that the plaintiffs acted *bona fide* in arresting the ship and the shipowners are therefore not entitled to succeed under this head of their counterclaim. The learned counsel cited the case of *Walter Turnbull & Others* v. *The Owners of the Ship "Strathnaver"*[7] where it was held —

"No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of *mala fides* or malicious negligence."

In my opinion, the shipowners are not entitled to succeed in their counterclaim for demurrage as I am satisfied that in this particular case, the plaintiffs acted *bona fide* when they arrested the ship.

The rest of the counterclaim fails as the plaintiffs have succeeded in their claim.

Now as regards the costs of the second defendants, Mr. Puthucheary has asked the court to order the plaintiffs to pay the second defendants' costs in any event or if a *Bullock Order* is made, it should be in an unadulterated form, meaning that the court should order the plaintiffs to pay the second defendants' costs and the plaintiffs are allowed to recover such costs from the first defendants. Mr. Puthucheary cited to me *Mayer* v. *Harte and Others*[8] where it was held that —

"costs were in the discretion of court, subject only to the requirement that the discretion must be judicially exercised, and there was no principle of law that required the county court judge to make an order for the first and second defendants to recover their costs direct from the third defendant merely because the third defendant was insolvent, nor was it shown that the county court judge failed to take into consideration the third defendant's insolvency when deciding what order to make as to costs, therefore the county court judge had not failed to exercise discretion judicially and the Court of Appeal would not interfere."

Mr. Karthigesu submitted that there was no justification on the part of the plaintiffs to bring in the second defendants and that the plaintiffs should pay the second defendants' costs. He referred to a passage in the *White Book* (1970) p. 835 under the heading "Co-defendants".

Mr. O'Connor, on the other hand, argued that there was every justification on the part of the plaintiffs in bringing in the second defendants in view of the allegation of negligence contained in the first defendants' counterclaim against the second defendants and of the subsequent third party proceeding which was taken out seeking indemnity, and as a result of which the second defendants were made co-defendants.

In this case, I am quite satisfied that in view of the circumstances of this particular case, the plaintiffs were quite justified in bringing in the second defendants as co-defendants. Nevertheless, what the court has to consider is this. If costs of the second defendants is ordered to be paid direct by the first defendants, it might amount to completely depriving the second defendants of their costs. The only asset of the first defendants prior to instituting the action was the ship which was arrested by the plaintiffs. It was later released on a bank guarantee to the extent of $190,000 which sum in actual fact represented the only sum available to satisfy the claim including interest and costs. The plaintiffs' claim excluding interest at 6% and costs amounts to $169,291.34. The amount guaranteed is therefore quite insufficient to cover even the plaintiffs' claim.

In view of these circumstances, I am of the opinion that the proper order as to costs of the second defendants is to order the plaintiffs to pay the second defendants' costs. The costs of the second defendants paid by the plaintiffs shall be included in the costs to be paid by the first defendants to the plaintiffs.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Allen & Gledhill; Tunku Zuhri, Manan & Abdullah.*